

Agricultural Guest Workers: Legislative Activity in the 113th Congress

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Summary

Foreign temporary workers, also known as guest workers, have long performed legal agricultural labor in the United States through different temporary worker programs. Today, agricultural guest workers may perform farm work of a temporary or seasonal nature through the H-2A visa program.

Bringing in H-2A workers is a multi-agency process involving the U.S. Department of Labor (DOL), the U.S. Department of Homeland Security (DHS), and the U.S. Department of State (DOS). As a first step, interested employers must apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Among the H-2A labor certification requirements, employers must pay the highest of several wage rates and must provide workers with housing, transportation, and other benefits. The H-2A program is not subject to a numerical limit. Over the years, both growers and labor advocates have criticized the program. Growers complain that it is administratively cumbersome, expensive, and ineffective in meeting their labor needs. Labor advocates argue that the H-2A program provides too few protections for workers.

The House Judiciary Committee and the Senate have acted on separate bills that would establish new temporary agricultural worker visas to replace the H-2A visa. The House Judiciary Committee ordered reported the Agricultural Guest Worker Act (H.R. 1773) and the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744). While the new visa programs proposed in these bills are different, they share some similarities that distinguish them from the H-2A program. For example, unlike the H-2A visa, the new visas would not be limited to temporary or seasonal work, would not require prospective employers to apply to DOL for labor certification or to meet all existing certification requirements, and would provide for at-will employment by agricultural workers.

H.R. 1773 would establish an H-2C agricultural worker visa. After undertaking to recruit U.S. workers, a prospective H-2C employer would file a petition with the U.S. Department of Agriculture (USDA) containing attestations concerning U.S. worker recruitment, worker benefits and wages, and other issues. With respect to wages, an employer petitioning for H-2C workers would have to pay the greater of the prevailing wage rate or the applicable minimum wage. The H-2C program would have a numerical cap of 500,000, subject to adjustment by USDA.

S. 744, a comprehensive immigration reform bill that addresses a wide range of immigration issues, would create a W-3 visa for contract agricultural workers and a W-4 visa for at-will agricultural workers. A prospective W-3 or W-4 employer would have to engage in U.S. worker recruitment. To import a W-3 or W-4 worker, an employer would submit a petition to DHS containing specified attestations, including attestations about contracts, U.S. worker recruitment, and compliance with other employer requirements. Required wages would be defined based on six standard agricultural occupational classifications, with certain wages specified and others to be determined by USDA, in consultation with DOL. W-3 and W-4 visas would be capped initially at 112,333 total visas per year, with provisions for USDA, in consultation with DOL, to adjust these caps and to set visa limits for later years.

In addition to establishing new agricultural worker visas, both the House and the Senate proposals would enable certain unauthorized aliens to obtain legal temporary or permanent immigration status in the United States.

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Introduction

Foreign temporary workers, also known as guest workers, have a long history of performing agricultural labor in the United States. In the past, agricultural guest worker programs were established in the United States during times of war. During World War I, for example, tens of thousands of Mexican workers performed mainly agricultural labor as part of a temporary worker program. The controversial Bracero program, which began during World War II and lasted until 1964, brought several million Mexican agricultural workers into the United States.¹ Today, the United States imports agricultural guest workers in much smaller numbers as part of a temporary worker program known as the H-2A visa program.

The H-2A program, and agricultural guest worker programs more generally, are controversial. Some view them as a necessary source of legal workers and call for their reform and expansion.² Others view the H-2A program, in its current form, as exploitative and argue that it must be thoroughly overhauled if it is to be allowed to continue operating.³ These differing views are reflected in tensions in agricultural and other guest worker programs between providing protections to U.S. and foreign workers on the one hand and making the programs responsive to legitimate employer needs on the other.

Over the past 15 years, a variety of legislative proposals have been put forward concerning agricultural guest workers. Some proposals would have reformed the H-2A program, while others would have established new guest worker programs for agricultural workers. Some of these proposals have been introduced in Congress as stand-alone bills, while others have been part of larger comprehensive immigration reform measures.⁴ In the 113th Congress, bills that would create new agricultural guest worker programs have been acted on in the House and the Senate.

H-2A Agricultural Worker Visa

The Immigration and Nationality Act (INA) of 1952, as amended,⁵ enumerates categories of aliens, known as nonimmigrants, who are admitted to the United States for a temporary period of time and a specific purpose. Nonimmigrant visa categories are identified by letters and numbers, based on the sections of the INA that authorize them. Among the major nonimmigrant visa categories is the “H” category for temporary workers. Included in this category is the H-2A visa for temporary agricultural workers.⁶ The H-2A visa program is administered by the Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security (DHS). DOL’s Wage and Hour Division (WHD) also has certain concurrent enforcement responsibilities. The H-

¹ For additional information about these past programs, see U.S. Congress, Senate Committee on the Judiciary, *Temporary Worker Programs: Background and Issues*, committee print, 96th Cong., 2nd sess., February 1980.

² See, for example, testimony of Bob Stallman and testimony of Chalmers Carr, at U.S. Congress, House Committee on the Judiciary, *Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program*, hearing, 113th Congress, 1st session, February 26, 2013.

³ See, for example, Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*, 2007.

⁴ For information about agricultural worker legislation introduced in past Congresses, see archived CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno (105th-111th Congress); and CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, by Andorra Bruno (112th Congress).

⁵ Act of June 27, 1952, ch. 477, codified at 8 U.S.C. §1101 *et seq.* The INA is the basis of current immigration law.

⁶ INA §101(a)(15)(H)(ii)(a).

2A program currently operates under regulations issued by DHS in 2008 and by DOL in 2010,⁷ in addition to the INA provisions.

The H-2A program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature, provided that U.S. workers are not available. Under current regulations, participation in the H-2A program is limited to designated countries.⁸ In general, for purposes of the H-2A program, work is of a temporary nature where the employer's need for the worker will last no longer than one year. Thus, an approved H-2A visa petition is generally valid for an initial period of up to one year. An employer can apply to extend an H-2A worker's stay in increments of up to one year, but an alien's total period of stay as an H-2A worker may not exceed three consecutive years. An alien who has spent three years in the United States in H-2A status may not seek an extension of stay or be readmitted to the United States as an H-2A worker until he or she has been outside the country for three months.

Bringing workers into the United States under the H-2A program is a multi-agency process involving DOL, DHS, and the Department of State (DOS). An interested employer must first apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. Before filing a labor certification application, prospective H-2A employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state employment service agencies (also known as state workforce agencies, or SWAs) in local, intrastate, and interstate recruitment efforts. Under the H-2A program's "fifty percent rule," employers are required to hire any qualified U.S. worker who applies for a position during the first half of the work contract under which the H-2A workers who are in the job are employed.

As part of the labor certification process, H-2A employers must offer and provide required wages and benefits to H-2A workers and workers in "corresponding employment," which is defined in current regulations as employment of non-H-2A workers by an employer who has an approved H-2A labor certification in any work included in the job order or in any agricultural work performed by the H-2A workers. H-2A employers must pay their workers the highest of several wage rates: the federal or applicable state minimum wage, the prevailing wage rate, the adverse effect wage rate (AEWR), or the agreed-upon collective bargaining wage.⁹ They must provide a "three-fourths guarantee"; that is, they must guarantee to offer workers employment for at least three-fourths of the contract period. H-2A employers also must provide non-commuting workers with housing at no cost, must provide or pay for certain worker transportation, and must provide other specified benefits, including workers' compensation insurance. The INA does not require H-2A employers to provide health insurance coverage.¹⁰ DOL is authorized under the INA to take such

⁷ U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2A Nonimmigrants," 73 *Federal Register* 76891-76914, December 18, 2008; U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Agricultural Employment of H-2A Aliens in the United States," 75 *Federal Register* 6884-6995, February 12, 2010. The DHS regulations are codified at 8 C.F.R. §214.2(h). The DOL regulations are codified at 20 C.F.R. Part 655, Subpart B (ETA), and 29 C.F.R. Part 501 (WHD).

⁸ For 2013, nationals of 59 countries are eligible to participate in the H-2A program. For a list of these countries, see U.S. Department of Homeland Security, "Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs," 78 *Federal Register* 4154-4155, January 18, 2013.

⁹ For further discussion of H-2A wage rates, see CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*.

¹⁰ H-2A workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of Medicaid emergency services. For related information, see archived CRS Report R41714, *Treatment of Noncitizens Under the Patient Protection and Affordable Care Act*, by Alison Siskin.

actions as necessary to ensure employer compliance with the terms and conditions of H-2A employment.

After receiving labor certification, a prospective H-2A employer can submit an application, known as a petition, to DHS to bring in foreign workers. If the petition is approved, foreign workers who are abroad can then go to a U.S. embassy or consulate to apply for an H-2A nonimmigrant visa from the Department of State. If the visa application is approved, the worker is issued a visa that he or she can use to apply for admission to the United States at a port of entry. H-2A workers can be accompanied by eligible spouses and children, who are issued H-4 visas.

The H-2A program is not subject to a statutory numerical limit and has grown significantly over the last 20 years, although it remains quite small relative to total hired farm employment. One way to measure the H-2A program's growth is to consider changes in the number of H-2A visas issued annually by DOS. In FY1992, DOS issued 6,445 visas. In FY2012, according to preliminary DOS data, 65,345 H-2A visas were issued.¹¹

Legislative Activity in the 113th Congress

Over the years, both growers and labor advocates have criticized the H-2A program. Growers complain that the program is administratively cumbersome, expensive, and ineffective in meeting their labor needs. Labor advocates argue that it provides too few protections for workers.

In the late 1990s, representatives of growers and workers reached agreement on legislation to address the foreign agricultural worker issue. The legislation became known as the Agricultural Job Opportunities, Benefits, and Security Act, or AgJOBS. It combined provisions to reform the H-2A program with provisions to grant lawful permanent resident (LPR) status to eligible farm workers through a two-stage process. AgJOBS legislation became the basis of a bipartisan compromise on foreign agricultural workers in the 106th Congress,¹² but that compromise fell apart at the end of that Congress after the 2000 election of President George W. Bush. More recently, AgJOBS titles were included in comprehensive immigration reform bills considered in the 109th and 110th Congresses. None of these bills were enacted.

In the 113th Congress, the House Judiciary Committee and the full Senate have acted on separate bills that address foreign agricultural workers. Both bills, among other provisions, would establish new temporary agricultural worker visas. The House Judiciary Committee ordered reported the Agricultural Guest Worker Act, or the AG Act (H.R. 1773), which would create a new H-2C nonimmigrant agricultural worker visa, and the Senate passed a comprehensive immigration reform bill, the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), which would establish new W-3 and W-4 nonimmigrant visas for agricultural workers.

While the new agricultural worker visas proposed in the House and the Senate measures are different from one another, they share some similarities that distinguish them from both the existing H-2A visa and the reforms to the H-2A visa proposed in AgJOBS legislation considered in past Congresses. Both the House and the Senate bills would sunset the H-2A visa program. Among the new features of the House-proposed and the Senate-proposed replacement agricultural

¹¹ For FY1992-FY2011 data on H-2A visa issuances, see Appendix C of CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*.

¹² Two similar AgJOBS bills (S. 1814 and H.R. 4056) were introduced in the 106th Congress. Formal congressional consideration was limited to a Senate Immigration Subcommittee hearing on S. 1814.

worker visa programs, these visas, unlike the H-2A visa, would not be limited to temporary or seasonal agricultural work¹³ and would not require prospective employers to apply to the Department of Labor for labor certification or to meet all existing certification requirements. Both programs also would provide for at-will employment by agricultural workers. In addition, both the House and the Senate agricultural worker proposals include provisions to enable certain unauthorized aliens to obtain legal temporary or permanent immigration status.

H.R. 1773

H.R. 1773, as ordered reported by the House Judiciary Committee, would establish a new H-2C agricultural worker visa. An employer seeking to employ H-2C workers would be required to recruit U.S. workers by submitting the job opportunity to the local state workforce agency for posting on the agency website for 30 days. The employer would have to offer the job to any qualified U.S. worker who applies before the first day that an H-2C worker begins work for the employer.

To import an H-2C worker, the employer would file a petition with the U.S. Department of Agriculture (USDA) containing specified attestations concerning U.S. worker recruitment, worker benefits and wages, and other issues. Among these attestations, the employer would have to assure that he or she will provide the same minimum benefits, wages, and working conditions to all workers employed in jobs for which the employer is seeking to hire H-2C workers and to other temporary workers in the same occupation at the place of employment. With respect to wages, an employer petitioning for H-2C workers would have to pay the greater of the prevailing wage rate or the applicable federal, state, or local minimum wage. A petitioning employer also would have to guarantee to offer workers employment for at least 50% of the anticipated employment period. Under H.R. 1773, H-2C employers would not be required to provide housing to workers or to cover their transportation costs.

An H-2C worker employed in a job that is temporary or seasonal in nature would be admitted to the United States for an employment period of up to 18 months. An H-2C worker employed in a position that is not temporary or seasonal would be admitted for an employment period of up to 36 months. An H-2C worker who completes a period of employment and is interested in performing additional work would have up to 30 days to find another offer of employment. The worker's period of stay could be extended to perform employment for a petitioning employer (or to perform at-will employment, as discussed later in this section). If an employer wants to employ an H-2C worker who is lawfully present in the United States, the employer would file a petition requesting an extension of the alien's stay and, if applicable, a change in the alien's employment. If the worker is lawfully present on the date the petition is filed, he or she could begin the new period of employment immediately.

H-2C workers would be subject to maximum stay limits. The maximum continuous period of stay for an H-2C worker employed in a job that is temporary or seasonal would be 18 months. For an H-2C worker employed in a job that is not temporary or seasonal in nature, the initial maximum continuous period of stay would be 36 months and subsequent maximum continuous periods of stay would be 18 months. After reaching the applicable maximum stay limit, an H-2C worker would have to be outside the United States for up to three months before the worker could again be admitted to the United States in H-2C status.

¹³ While the proposed visa programs would limit foreign agricultural workers to a temporary period of admission, as specified in each bill, the workers would not be limited to performing agricultural labor that is temporary in nature.

The H-2C program would have a numerical cap of 500,000, subject to adjustment by USDA. The cap would not apply to an alien who performs 575 hours of agricultural labor in the United States during the two-year period beginning on the bill's date of enactment.

H.R. 1773 would establish a trust fund "for the purpose of providing a monetary incentive for H-2C workers to return to their country of origin upon expiration of their visas." Deposits into the trust fund would consist of withheld wages (in the case of H-2C workers employed in temporary or seasonal jobs) and employer payments (in the case of H-2C workers employed in other jobs). H-2C workers would apply for payment of the funds at a U.S. embassy or consulate in their home country. H-2C workers could not be accompanied to the United States by their spouses and children.

H.R. 1773 would further allow for at-will employment by H-2C workers for employers who are designated as "registered agricultural employers." However, an H-2C worker could only perform such at-will employment if the worker is lawfully present in the United States as an H-2C worker and has completed a period of employment for an H-2C petitioning employer. USDA would be tasked with establishing an application process to designate registered agricultural employers who meet the requirements specified in the bill. These employers would be subject to the same attestations, trust fund requirements, and minimum wage and benefit obligations as employers submitting H-2C petitions, except for the employment guarantee. A designation as a registered agricultural employer would be valid for three years and could be extended for additional three-year terms.

USDA would be responsible for conducting investigations and audits to ensure compliance with the requirements of the H-2C program, including the at-will employment provisions. DHS would be directed to remove any H-2C worker from the United States who violates any term or condition of H-2C status.

H.R. 1773 would permit aliens who were unlawfully present in the United States on April 25, 2013, the day before the bill's date of introduction, to obtain legal temporary status as H-2C agricultural workers. Separate provisions would enable aliens who were present in the United States on April 25, 2013, and who had performed not fewer than 575 hours of agricultural labor in the country during the two-year period ending on the date of the bill's enactment, to continue to perform agricultural labor for an unspecified period of time.

S. 744

S. 744, as passed by the Senate, would create a W-3 visa for contract agricultural workers and a W-4 visa for at-will agricultural workers as part of a new W nonimmigrant visa category for lower-skilled workers.¹⁴ Prospective W-3 or W-4 employers would need to register as "designated agricultural employers" (DAEs) with USDA, as specified in the bill. A registration would be valid for three years and could be renewed for another three years.

An employer interested in employing a W-3 or W-4 worker would have to submit the job opportunity to the local state workforce agency and authorize its posting on a DOL job registry for 45 days. The employer would be required to offer the job to any equally or better qualified U.S. worker who applies during this period.

To import a W-3 or W-4 worker, a DAE would submit a petition to DHS containing specified attestations, including attestations about contracts, U.S. worker recruitment, and compliance with

¹⁴ The S. 744 provisions on nonimmigrant agricultural worker visas are in §§2131-2134.

other employer requirements. Among the latter requirements are guaranteeing to offer employment to W-3 workers for three-quarters of the employment period and providing W-3 and W-4 workers with housing or a housing allowance and transportation costs, as specified.¹⁵ Required wages would be defined based on six standard agricultural occupational classifications, with certain wages specified and others to be determined by USDA, in consultation with DOL. DAEs seeking to hire U.S. workers would have to offer these workers not less than the same benefits, wages, and working conditions as W-3 and W-4 workers, except that they would not be required to provide U.S. workers with housing or a housing allowance. S. 744 identifies five Special Procedures Industries¹⁶ and provides for the issuance of separate regulations by USDA, DHS, or DOL regarding applicable housing, pay, and application procedures for these industries.

A W-3 or W-4 worker would be admitted to the United States for a period of three years.¹⁷ This period of admission could be extended for one additional three-year period, after which the worker would need to be outside the United States for three months before he or she could be readmitted in W-3 or W-4 status. After a W-3 worker completes a contract with a DAE, the worker could seek subsequent employment with another DAE. A W-4 worker could seek at-will agricultural employment with a DAE at any time. A W-3 or W-4 worker would lose nonimmigrant status and would have to leave the country if he or she is unemployed for a period of more than 60 days, unless granted a waiver by DHS.¹⁸

W-3 and W-4 visas would be capped at 112,333 total visas per year during the first five years, with provisions for USDA, in consultation with DOL, to adjust these caps and to set visa limits for subsequent years. W-3 and W-4 workers would not be allowed to bring their spouses and children with them to the United States.

W-3 and W-4 workers would be covered by all applicable labor and employment laws, including the Migrant and Seasonal Agricultural Workers Protection Act.¹⁹ DOL would be authorized to establish procedures to investigate complaints against employers of W-3 or W-4 workers and to conduct compliance investigations under any labor law. USDA would be required to monitor W-3 and W-4 workers using the electronic employment eligibility verification system that S. 744 would separately establish²⁰ and a new electronic monitoring system that DHS would be tasked with developing, to monitor the presence and employment of W workers.

Separate from the provisions on W-3 and W-4 visas, S. 744 would establish a two-stage agricultural worker legalization program, through which farm workers who had performed a requisite amount of agricultural work in 2011 and 2012 and who satisfy other requirements could obtain a temporary resident status, termed “blue card” status. After meeting additional agricultural work and other requirements, these workers could apply for LPR status.²¹

¹⁵ Housing and transportation benefits would differ for W-3 and W-4 workers.

¹⁶ They are (1) sheepherding and goat herding, (2) itinerant commercial beekeeping and pollination, (3) open range production of livestock, (4) itinerant animal shearing, and (5) custom combining industries.

¹⁷ This period of admission would be a set three years and would not be based on the length of the period of employment.

¹⁸ A worker could be granted a waiver in cases of injury or natural disaster.

¹⁹ H-2A workers are not covered by the Migrant and Seasonal Agricultural Workers Protection Act. Further information about this law is available at the DOL website at <http://www.dol.gov/whd/mspa/>.

²⁰ Termed the Employment Verification System (EVS) in S. 744, this system would be modeled on the existing E-Verify system. For information on E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

²¹ S. 744’s agricultural worker legalization provisions are in §§2211-2215. For further discussion of these provisions,

see CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*, by Marc R. Rosenblum and Ruth Ellen Wasem.

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